

Service Date: November 10, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION  
MONTANA PUBLIC SERVICE COMMISSION  
P.O. Box 202601  
Helena, Montana 59620-2601

In the matter of the Application of Tracy	)	Transportation Division
Burland, dba Mr. B's Limo, for a Montana	)	Docket T-03.2.PCN
Intrastate Certificate of Public Convenience	)	Order No. 6541
and Necessity.	)	

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

Tracy Burland, 367 Michal Road, Ronan, Montana 59864, appearing pro se

FOR THE PROTESTANTS:

Debra D. Parker, Esq., Connell Law Firm, 502 West Spruce, P.O. Box 9108, Missoula, Montana 59807

COMMISSION STAFF:

Robin A. McHugh, Staff Attorney, 1701 Prospect Avenue, Helena, Montana 59620

BEFORE:

Bob Rowe, Commissioner and Hearing Examiner

BACKGROUND

1. On January 13, 2003 the Commission received an application from Tracy Burland, dba Mr. B's Limo (Applicant) for a Certificate of Public Convenience and Necessity, Class B, authorizing the transportation of passengers in Limousine service between all points and places in Flathead, Lake and Missoula Counties, Montana.<sup>1</sup>

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<sup>1</sup> At the request of Commission staff, Mr. B's clarified the scope of authority applied for by letter received January 17, 2003.

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2. The Commission received written protests from the following carriers: Wild Horse Limousine and Carriage Co., 704 Sixth Avenue West, Kalispell, Montana, 59901, PSC No. 9397; Valet Limousine, Inc., 3820 South 3rd West, Missoula, Montana 59807, PSC 7172; and Flathead Area Custom Transportation, Inc., dba Kalispell Taxi and Airport Shuttle Service, P.O. Box 2508, Kalispell, Montana 59901, PSC No. 56.<sup>2</sup>

3. Following issuance of proper Notice a hearing was held on May 23, 2003 in the Signal TV/ReliaCom Conference Room, 124 Main Street SW, Ronan, Montana. Protestant Kalispell Taxi did not appear at the hearing. At the conclusion of the hearing the parties stipulated to the issuance of a final order. (TR 91)<sup>3</sup>

#### SUMMARY OF TESTIMONY

##### Testimony of Applicant

4. Tracy Burland, owner of the Applicant, Mr. B's Limo (Mr. B's), appeared and testified in support of the application. Mr. Burland explained that he owns a 1989 six-passenger limousine that is licensed and registered and that he maintains at his own shop. If granted authority Mr. Burland pledged that he would comply with the requirements of the Commission and that the limousine would be driven by licensed drivers with good driving records. Mr. Burland stated he believes there is a public need for the service applied for. He gave several examples to support his belief, including a need to transport "prominent people," transportation to and from funeral

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<sup>2</sup> Kalispell Taxi was granted late intervention on March 25, 2003. Notice of Commission Action, March 28, 2003.

<sup>3</sup> Due to the amount of time that has elapsed since hearing the Commission ordered a transcript of the hearing. The transcript may be viewed at the Commission offices in Helena, or may be ordered from Martin Lake & Associates, Inc. (800) 735-5498.

homes, and transportation for "proms and weddings." (TR 27) Mr. Burland noted that, although his application is for three counties, his "primary focus" is transportation in "the Polson and Ronan environs." (TR29) He conceded that he has operated a limousine service without authority from the Commission. (TR 33)

5. William E. Olson, 2003 president of the Polson Chamber of Commerce, appeared and testified in support of the application. Mr. Olson stated that in his capacity as a banker he has reviewed Mr. B's business plan and believes there is a need for limousine service in the Polson area. (TR 7) He conceded he was not aware that limousine service in the Polson area is available from Missoula and Kalispell, id., but that he would not use those services because Mr. B's "could deliver the service at a lower cost." (TR 11) Mr. Olson said he would use Mr. B's service. Id. He also said special consideration should be given to Mr. B's application because Mr. B's would serve tribal members on the reservation. (TR 10) Mr. Olson admitted that he had never used limousine service, had never investigated the use of limousine service, and that his understanding of public need is based on conversations with Mr. Burland. (TR 12-13)

6. Dennis Anderson, president of Anderson Broadcasting in Polson, appeared and testified in support of the application. Mr. Anderson stated he supports the application because of the opportunity to use a limousine service as a part of "promotional activities" by his radio stations. (TR 17-19) He conceded that he had not been aware of existing limousine services (TR 16), and that his support for the application was primarily based on a desire for a local limousine provider. (TR 20-21)

7. Jeffrey J. Smith, news director at KERR and KQRK radio, appeared and testified in support of the application. Mr. Smith said he had never used a limousine service, nor was he aware that limousine service was available. (TR 36-37) He said he would use service from Mr. B's as part of promotional activities at the radio station. (TR 36) Mr. Smith was not clear as to whether he would use existing limousine carriers, but indicated a strong preference for using a local carrier. (TK 39)

#### Testimony of Protestants

8. Bruce Johnson, manager of Valet Limousine (Valet) appeared and testified in opposition to the application. Valet has authority to provide limousine service in the same geographic area as that applied for by Mr. B's: all points and places in Flathead, Lake and Missoula Counties. Mr. Johnson indicated Valet advertises in the Kalispell and Missoula phone books, and that Valet operates "basically" in Western Montana. (TR 44) He said that Valet has the ability to "carry more shippers" and that on those rare occasions when Valet is unable to provide service it contacts other carriers. (TR 45-46) Mr. Johnson acknowledged that Valet is not listed in the Ronan phone book, (TR 47) and that he didn't know how much business Valet has done in Lake County. Id. He also said Valet has not done radio advertising in Lake County (TR 48) He indicated that to his knowledge Valet has never turned down a request for service in Lake County. (TR 52)

9. Corrina Schmidt, office manager for Valet, appeared and testified in opposition to the application. Ms. Schmidt stated that, other than prom nights, Valet has always been able to

provide service. (TR 57) She was very clear about Valet's business as related to prom night in Missoula County, less so regarding prom nights in Flathead and Lake Counties. She testified that from April 2002 through April 2003 Valet had not turned down a request for service from Lake County. (TR 60)

10. Marc Rold, owner of Wild Horse Limousine and Carriage Company (Wild Horse) appeared and testified in opposition to the application. Mr. Rold said he has authority to operate in Flathead County, "and anywhere in the state where the trip originates or concludes in Flathead County." (TR 63) The Commission takes administrative notice that PSC No. 9397 authorizes Wild Horse Service outside of Flathead County only if the movements "originate in Flathead County[.]" Mr. Rold described his business and indicated his business would be harmed by additional competition. (TR 63-64)

#### EXHIBITS

11. The following exhibits were admitted at the hearing:

Valet A - Page 361 from the Missoula phone book yellow pages showing an advertisement for Valet Limousine

- Page 242 from the Kalispell phone book yellow pages showing a listing for Valet Limousine

Valet B - Calendar of limousine trips for the period April 2002 through April 2003. (The Commission's copy of Valet B is with Docket No. T-02.28.PCN).

Wild Horse A - Brochure for Wild Horse;

Page from a wedding booklet containing an advertisement for Wild Horse;

Page 107 of the Hagadon directory containing a listing for Wild Horse

Wild Horse B - Calendar of limousine trips for period May 2002 through April 2003

DISCUSSION, ANALYSIS AND FINDINGS OF THE HEARING EXAMINER

12. In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA. Paragraph (2) (a) of that section provides as follows:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

13. Applying this language to the facts presented by any application for transportation authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the applicant has demonstrated that there is a public need for the proposed service. If the applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need

that cannot be met as well by existing carriers; the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the applicant fit to provide the proposed service.

14. The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

15. The first question to be addressed therefore, is whether the Applicant has demonstrated a public need for the proposed limousine service. A public need for limousine service between all points and places in Lake County, and service originating in Lake County to all points and places in Missoula and Flathead counties was demonstrated by witnesses Burland, Olson, Anderson and Smith. A public need for limousine service between all points and places in lake, Missoula and Flathead Counties was not demonstrated, and those parts of the Application are denied.



16. The second question is whether existing carriers can and will meet the public need demonstrated. In theory a limousine carrier with cars located in Missoula could meet any public need Lake County. In practice, however, this record (see testimony of Olson, Anderson and Smith) demonstrates that with respect to this kind of transportation persons are skeptical of the feasibility of limousine service from Missoula or Kalispell, don't consider procuring such a service, and prefer local service. Normally the Commission gives slight weight to such testimony, especially if there is little demonstrated effort to investigate and use the services of existing carriers. In this case, however, being skeptical of non local carriers reflects common sense. The Polson/Ronan area is located many miles from Missoula over a heavily traveled and often weather impacted highway. The idea that a limousine service operating a vehicle out of Missoula can meet the public need "as well" in Lake County is not plausible on its face. In addition, as urged on the record, it is reasonable to be especially responsive to a preference for local service when the service will have significant operations in Indian Country.

17. The third question is whether a grant or partial grant of the authority applied for will harm existing carriers contrary to the public interest. The Commission has recently decided that with respect to limousine service it will not apply this third element "as rigorously as if it were dealing with an essential service." Docket No. T-03.47.PCN, Order No. 6543a, ¶ 21, p. 7 (April 16, 2004). In this case there is no demonstration of harm by protesting carriers, let alone that such harm would be contrary to the public interest. It is not reasonable to simply assume that any additional competition will cause harm contrary to the public interest.

#### FITNESS

18. The record indicates that the Applicant is fit to operate a limousine service.



HEARING EXAMINER CONCLUSIONS OF LAW

19. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

20. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

21. Applicant has demonstrated a public need for the proposed service in Lake County, and for service originating in Lake County to Flathead and Missoula counties.

22. The totality of the record indicates that existing carriers cannot meet as well the need for the proposed service.

23. The Applicant has demonstrated fitness to provide the service proposed.

24. The authority granted by this Order will not adversely impact existing carriers contrary to the public interest.

COMMISSION DISCUSSION, ANALYSIS AND FINDINGS

25. The Commission concurs with and adopts the findings and conclusions of the hearing examiner as contained at paragraphs 1-14 and 19 and 20. However, the Commission

finds that the record in this case does not support a grant of authority, and does not adopt the analysis or conclusions of the hearing examiner at paragraphs 15-18, or 21-24. Instead the Commission analyzes and concludes as follows.

26. The first question is whether the Applicant has demonstrated a public need for the proposed limousine service. The Commission finds that it has not. In order to demonstrate public need an applicant must present shipper witnesses or persons who can testify that they personally have a need for the transportation service applied for.<sup>4</sup> The witnesses that appeared for Mr. B's are not shipper witnesses. Two of the witnesses said that limousine service would be useful in connection with radio station promotions, but did not indicate that they ever personally sought the services of a limousine, or that the radio station, independent of the Applicant, had thought of limousine service in connection with radio promotions. The third witness, a Polson banker, testified only that he agreed with the Applicant that there is a need for limousine service in the "Polson area," and that his opinions are based on conversations with Tracy Burland. He could not testify to ever having used or investigated limousine service. Because none of these witnesses are shipper witnesses the Commission cannot find that Applicant has demonstrated public need. Because the Applicant has failed to demonstrate public need, or that existing carriers cannot meet any need that has been demonstrated, other elements of public convenience and necessity are moot.

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<sup>4</sup> See, e.g., In the Matter of the application of Jones Brothers Trucking, Inc., Docket No. T-9469, Order No. 5987a, pp. 8-10, July 17, 1990.

CONCLUSIONS OF LAW

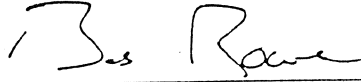
1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to title 69, Chapter 12, MCA.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.
3. Applicant has not demonstrated a public demand or need for the proposed service.
4. Assuming, arguendo, public demand or need, Applicant has not demonstrated that existing carriers cannot meet that demand or need.
5. The public convenience and necessity do not require the granting of the application herein.

ORDER

Now Therefore It Is ordered that the application in this Docket is denied.

Done and dated this 26<sup>th</sup> day of October 2004, by a vote of 3 to 2.

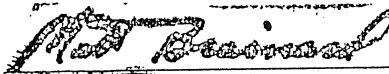
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



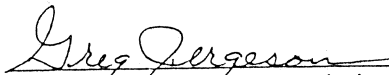
BOB ROWE, Chairman and Hearings Examiner  
(dissenting)



THOMAS J. SCHNEIDER, Vice Chairman  
(concurring with separate opinion attached)



MATT BRAINARD, Commissioner

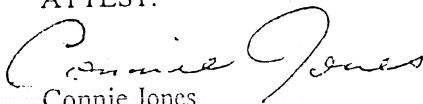


GREG JERGESON, Commissioner



JAY STOVALL, Commissioner (dissenting)

ATTEST:



Connie Jones  
Commission Secretary

(SEAL)

NOTE:

Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

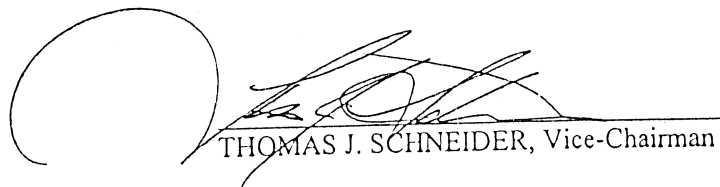
CONCURRING OPINION OF  
THOMAS J. SCHNEIDER, VICE CHAIRMAN

The Commission's decision in Burland is technically and legally correct and certainly defensible under existing transportation law. I am, however, deeply troubled by the result, which leaves the Ronan-Polson area with no real or effective limousine service.

Unfortunately, Applicant did not present testimony by a threshold level of persons, who were actually interested in and committed to using such services. Had the applicant presented supporting witnesses, reflecting the various community/tribal groups and individuals described in his survey/outreach, the showing of public need under traditional transportation precedent would likely have been satisfied. Limousine service is by its nature more localized service and clientele' than many transportation services. Whether the lack of a substantial evidentiary case was due to lack of legal representation or unfamiliarity with PSC regulatory and legal requirements, a legitimate opportunity to provide a useful service to the public was lost or delayed.

The transcript reveals a complete lack of any serious effort by existing carrier(s) to either market or provide services in the Ronan-Polson area. No harm to existing carrier(s) could be shown, because no activity or revenues had been generated from this area. I consider the Ronan-Polson area to be effectively unserved and view the application in most respects similar to a new application for a new service.

The long delayed Commission decision is extremely unfortunate.

  
THOMAS J. SCHNEIDER, Vice-Chairman